

Bhasin (Migration) [2018] AATA 3592 (20 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Nidhi Bhasin
CASE NUMBER:	1701066
DIBP REFERENCE(S):	BCC2014/1292100
MEMBER:	Nicholas McGowan
DATE:	20 August 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 20 August 2018 at 12:29pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Non-judicially determined claim of family violence – Where the independent expert opined that the alleged family violence did not occur – Tribunal required to take the opinion of an independent expert as correct – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359A, 376

Migration Regulations 1994 (Cth), rr 1.21, 1.22, 1.23, 1.24, 1.25, Schedule 2, cl 801.221

STATEMENT OF DECISION AND REASONS

REVIEW

1. The applicant applied for the visa on 25 May 2014 on the basis of her relationship with the sponsor.
2. This is an application for review of a decision of a delegate of the Minister for Immigration on 20 January 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the Migration Act 1958 (the Act).
3. The applicant appeared before the Tribunal in a public hearing held in Melbourne to provide evidence and present arguments.
4. The Tribunal has before it the Department's file relating to the applicant; its own file; and copy of the Department's decision provided by the applicant to the Tribunal.

RELEVANT LAW

5. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
6. Relevantly to this matter, the primary criteria include cl.801.221 which requires the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.801.221(6)(b), (c)(i). The applicant claims this occurred in this case.
7. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence.
8. Relevant family violence is defined in r.1.21. These regulations, as relevant to this decision, are extracted in the attachment to this decision. The Tribunal notes that the violence, or part of the violence must have occurred during the relationship: r.1.23(3), (5), (7), (12), (14).

EVIDENCE AND FINDINGS

9. The applicant told the Tribunal that her relationship with the sponsor, had ceased.
10. The applicant's evidence to the Tribunal is that her sponsor is alive, and that she and her sponsor had no children of their relationship.

Has a claim of family violence been made under the regulations?

11. An Interim intervention Order was not final and the sponsor was not present at Court, nor was he served with a copy of the Application and Summons. The applicant also telephoned the Department of Immigration on 11 July 2016 and advised the Final Order was not granted (folio 100 of the Department's file). Accordingly, there is no 'judicially determined' claim of the applicant having suffered family violence under the legislation.

12. The relevant evidentiary requirements to raise a non-judicial claim of family violence are in r.1.24. This requires a statutory declaration under r.1.25, and the type and number of items of evidence specified by the minister (in this case) in instrument IMMI 12/116.
13. The applicant has provided the necessary document to the Department. The applicant has completed a statutory declaration dated 27 July 2016 under r.1.25 which set out the allegation of family violence and named her sponsor who she alleges perpetrated family violence. The applicant has also provided two statutory declarations by competent persons as per r.1.25.
14. In this case, the Tribunal has sought the opinion of an independent expert, about whether the alleged victim has suffered family violence: r.1.23(10)(c).
15. The Tribunal must take as correct the opinion of the expert as to whether the alleged victim has suffered domestic violence: r.1.23(10)(c), and if the opinion is that the alleged victim has suffered relevant domestic violence, the alleged victim is taken to have suffered family violence and the alleged perpetrator is taken to have committed family violence for the purposes of the relevant criterion: r.1.23.
16. The Department, as part of their decision, had also sought the advice of an Independent Expert. That information is contained in the Department's decision record the applicant provided to this Tribunal. That Expert reported that the applicant had "not suffered relevant family violence". This finding is not relevant for the purposes of a *de novo* review.
17. This Tribunal requested the opinion of an Independent Expert (not the same Expert as referred to above) about whether the alleged victim has suffered family violence. The Tribunal had advised the applicant it had sought that opinion.
18. The Tribunal received as assessment report from that second independent expert Ms Kerrilee Hollows Forensic Psychologist, in which Ms Hollows states (T1, f.65):

"In my opinion, relevant family violence that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own personal wellbeing or safety has not occurred."
19. The Tribunal provided that information to the applicant for her comment in accordance with s.359A of the Act.
20. The applicant's agent made a submission to this Tribunal in response to the information provided above (folios 108-109).
21. The applicant's agent contends (folio 109 points 1, 2 and 2.2) that the Independent Expert misconstrued a statutory tests and imported irrelevant requirements. The Tribunal does not share the applicant's assertion in this regard having full regard to the Expert's report.
22. Read in context, the Tribunal's view is that the Expert's observations (in the instances highlighted by the applicant's agent) seek to explain to the applicant (and other readers) how and why the Expert arrived at her ultimate (considered) opinion that "relevant family violence that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about her own personal wellbeing or safety has not occurred", and that any observations made within that report do not, in this case, imply or import a misconstruction of any statutory requirement/s *per se*. A finding to the contrary, would in this Tribunal's view, not constitute a fair reading of the Expert's report (when read as a whole and having had regards pertinent observations arrived at after full consideration of the evidence). It follows, therefore, that this Tribunal finds the Expert's report has been formed according to law.

23. The applicant's agent also contends (folio 108 point 2.3) that the Independent Expert failed to consider the claim put forward by the applicant, including in her statutory declaration dated 10 January 2018. The agent expands to claim that the expert not only failed to consider these matters individually, but also collectively, that is cumulatively. The Tribunal has considered this claim, but has found that contrary to the applicant's viewpoint. The Tribunal in mindfull that not only was the statutory declaration provided for consideration to the Expert (folio 87) including as part of the formal referral by this Tribunal to the Expert, but that it is clear from the expert's report that she HAS considered the contents, in the entirety. Evidence of this can be seen on page 15 (folio 81) of the Expert's report where she make specific reference to statutory declaration and evidence therein. There is no evidence or suggestion which reasonably supports the claim made by the applicant's agent that the Expert failed to somehow consider all the evidence provided both individually and cumulatively. It follows, therefore, that this Tribunal finds the Expert's report has been formed according to law.

Other considerations

24. A s.376 certificate was discussed with the applicant and her agent during the public hearing conducted in Melbourne. As this Tribunal advised the applicant and her agent no adverse weight was accorded to the information covered by the certificate, no submission was made (though an opportunity to do so was provided). Further, an email and accompanying letter from the applicant's sponsor in relation to their claimed relationship (found at folios 1-3) was not considered adverse information in the Tribunal's view, as the information contained within spoke more concisely to the bona fides of the relationship, than against. Accordingly, the Tribunal accorded the applicant the benefit of any doubt in regards to the claimed spousal relationship as it placed considerable weight on the Department's own assessment (found at folios 96-97) where it found the parties to be in a genuine and continuing relationship prior to the relationship breakdown (and in addition to the Tribunal's own consideration of the parties claimed relationship as assessed against the statutory and regulatory considerations and requirements).

FINDINGS

25. The Tribunal is satisfied that the opinion of the Independent Expert is authorised by the Regulations, in that it is provided by an independent expert who is a person suitably qualified to make the assessment, is an employee of an organisation specified for this purpose, and was properly made.
26. Under r.1.23 this Tribunal is required to take as correct an independent expert's opinion, properly made.
27. Accordingly, having found the Expert's opinion is properly made, this Tribunal finds that the applicant is not taken to have suffered family violence committed by the sponsor for r.1.22.
28. The Tribunal further finds that the applicant does not meet any of the alternative criteria for the grant of the visa. In particular, there is no evidence that the sponsor has died. There is no evidence that there are any orders in relation to any children. The Tribunal is not satisfied the applicant meets any of the alternatives applicable in this case for the grant of the visa.
29. Given the above conclusion that the claim of family violence has not been established, the applicant does not meet the requirements for the grant of the visa. As the applicant does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.

DECISION

30. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.